

97-166

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

FILED

JUN 26 1997

MISSOURI
PUBLIC SERVICE COMMISSION

In the Matter of AT&T Communications of the Southwest,)
Inc.'s Petition for Arbitration pursuant to Section 252(b))
of the Telecommunications Act of 1996 to Establish an)
Interconnection Agreement with Southwestern Bell)
Telephone Company.)

Case No. TO-97-40

In the Matter of Petition of MCI Telecommunications)
Corporation and its Affiliates, Including MCIMetro Access)
Transmission Services, Inc. for Arbitration and Mediation)
Under the Federal Telecommunications Act of 1996 of)
Unresolved Interconnection Issues with Southwestern Bell)
Telephone Company.)

Case No. TO-97-67

**SOUTHWESTERN BELL TELEPHONE COMPANY'S
MOTION TO STRIKE**

COMES NOW Southwestern Bell Telephone Company (SWBT) and for its Motion to Strike concerning the Motion for Approval of Interconnection Agreement (Motion) and the documents filed by MCI Telecommunications Corporation, MCIMetro Access Transmission Services, Inc. (MCI or MCIm) entitled MCIMetro/SWBT Interconnection Agreement states as follows:

I. DESCRIPTION OF ISSUES REFERENCED IN MCI'S PROPOSED AGREEMENT

On June 16, 1997, MCI filed its version of a proposed interconnection agreement. The proposed contract contains terms on which the parties agreed involving various issues, both those which were arbitrated and many which were not. The proposed contract also contains MCI's proposals on issues on which the parties were not able to agree, both those which were arbitrated and many more which MCI is presenting to the Commission for the first time. SWBT believes the Commission is empowered to address only those matters which were arbitrated but

as to which the parties cannot reach agreement on implementing language. The Commission is not empowered, nor should it even if it were empowered, to address new matters which MCI did not arbitrate. This latter category constitutes the majority of the contract issues which are in dispute. While SWBT negotiated all issues in good faith, and reached agreement on hundreds of issues which were not arbitrated, it is not appropriate to resolve these additional matters outside of the arbitration process.

In the MCI proposal, there is language in regular text which represents language to which the parties have agreed, both on arbitrated issues and those which were not. Throughout the proposed interconnection agreement are sentences which are bolded. These provisions represent MCI's proposed language on issues which were not arbitrated and which the Commission did not decide. There are only a few sections which contain bolded and underlined language, representing SWBT's proposed language on issues which were arbitrated but as to which the parties do not agree as to the application of the Commission's decision. SWBT requests that the Missouri Public Service Commission (Commission or PSC) strike all provisions which were not arbitrated and as to which the parties were not able to agree. The Telecommunications Act of 1996, under which this Arbitration was conducted, does not permit the Commission to decide issues which were not arbitrated. In the alternative, and without waiving its position that the Commission is without jurisdiction on those matters, if the Commission determines that any such issues should be decided, the Commission should permit SWBT to submit its proposed language and schedule a hearing to consider the merits of MCI and SWBT's respective positions.

II. ISSUES NEVER ARBITRATED OR AGREED UPON

Many of the contract issues presented by MCI pertain to matters which were not arbitrated before the Commission. These matters are identified in the proposed Interconnection Agreement by bold type with no corresponding SWBT proposed language. The PSC should strike these sections and not address the issues involved because 1) the Telecommunications Act of 1996 (Federal Act) does not permit the Commission to decide issues not arbitrated and 2) there is no factual record upon which the PSC could base its determination. As stated by MCI¹, MCI and SWBT have engaged in exhaustive negotiations which have culminated in agreement on numerous issues, including issues which were arbitrated and issues which were not arbitrated but which were negotiated and resolved between the parties.² As is obvious from the length and detail contained in the agreed upon language (that language which is not bolded or underlined) substantial negotiations have occurred. Though SWBT was willing to negotiate on all issues, even though most of these were not arbitrated by MCI, SWBT is not agreeable to post-arbitration procedures to resolve new issues. Under the Federal Act, MCI must raise its new issues in the context of another arbitration. A hearing must be held before the issues are submitted to the PSC. SWBT must be allowed to submit its alternative language and explain the rationale for the language in a record upon which the PSC can base a decision.

Section 252(b)(4) of the Federal Act limits the issues that may be decided in an arbitration to those set forth by the parties as unresolved. If MCI did not include an issue in the

¹MCI's Motion, p. 3.

²See, Section III for a discussion of some of the issues that were not arbitrated but were negotiated and resolved between MCI and SWBT.

Issues Memorandum filed with the PSC in this docket, then the PSC cannot now review the issue. As MCI's witness Ms. Russell acknowledged, it was MCI's position during the Arbitration that once the Commission decided a disputed issue, it would be the duty of the parties to take that ruling and develop acceptable contract language to implement that ruling. (Case No. TO-97-40, Tr. 1098, lns. 1-16). Ms. Russell continued by admitting that there were numerous issues which were not listed in the Issues Memorandum and as to which MCI submitted no testimony which were referenced in MCI's generic agreement. (Case No. TO-97-40, Tr. 1099-1103).

As was stated in the Arbitration Order issued in this docket, "[t]he issues set out by the parties within the Issues Memorandum and at the Arbitration shall be consistent with this order." (Order, p. 48) "The contested issues presented for arbitration were too numerous to be set out here, but may be ascertained by their designation through the Table of Contents to this Arbitration Order." (Order, p. 5). All of the sections of MCI's proposed Interconnection Agreement which are bolded and have no corresponding proposed SWBT bolded and underlined language were not addressed in the Issues Memorandum or in the Table of Contents in the Arbitration Order and should not be determined absent compliance with the Section 252 procedures.

A few examples demonstrate the fundamental unfairness of MCI's attempt to interject new issues at this late date. For example, in the area of ordering of unbundled elements (e.g., Attachment III, Network Elements), MCI wants SWBT to convert a customer/telephone number on an "as is" basis to unbundled elements. Had this issue been raised in the arbitration, SWBT would have strenuously objected because this substantive issue forms the very basis for the

differentiation between unbundled network elements and resale. MCI wants to place an order such that a customer's account be converted to an unbundled account without any further specificity from MCI to SWBT as to the particular elements or options which MCI, as the telephone company for the customer, would provide to make up its service. While SWBT does not object to MCI ordering elements in any combination, it does object to such an "as is" approach which places responsibility on SWBT for determining which elements are requested or desired for the particular service offered by MCI. It is clear that MCI's desire to be able to make such generic requests is to eliminate any distinction between resale and unbundling and acquire a lower price point. The FCC has said that an LSP must specify to the incumbent LEC what unbundled elements it seeks before the LSP can obtain such elements on an unbundled basis.³ (First Report and Order in CC Docket 96-98 released on August 8, 1996 in para. 297). Underlying MCI's position is the incorrect assumption that there is no operational difference when a customer is "converted as is". While the latter makes sense in a resale environment, it does not make sense in an unbundled environment in which a change of LSPs will involve changes in billing and testing systems. In addition, through unbundled elements, the LSP is developing its own network and it should specify the elements it wants, especially since it may substitute some of its own elements on a going-forward basis.

Another provision proposed by MCI which was not arbitrated or agreed to involves volume discounts. (Attachment 1, paragraph 6). MCI has inserted language into the proposed

³The FCC agreed with Bell South's position that Section 251(c)(3) requires requesting carriers to identify network elements with sufficient specificity so that their characteristics and appropriate uses can be defined. First Report and Order at para. 291.

interconnection agreement that states that MCI must be given an "additional Volume Discount applied to any services purchased." MCI insists that a Volume Discount must be applied to MCI for all service bought for resale or unbundled network elements which must be based "on total revenue generated by MCI for all services covered by this Agreement across all regions served by SWBT." SWBT's resale discount and rates for unbundled network elements cannot be further "discounted" by the PSC just because of the amount of services which MCI may purchase in other SWBT states. If MCI had arbitrated such an issue, which it did not, SWBT would have argued that SWBT's rates should not be further reduced for particular customers based on the volume of revenue generated by the provision of services to those customers.

Another provision which MCI has submitted to this PSC as an "arbitrated" issue requires SWBT to design Yellow Page advertising for MCI and use SWBT's sales force to sell Yellow Page advertising to MCI subscribers. SWBT, under MCI's required language, is then to compensate MCI with "a 20% commission" on all advertising revenue generated. (Attachment VIII, paragraph 7.1.3.9). No such Yellow Page advertising issue was ever submitted to the PSC for arbitration. SWBT does not have such a sales force and would refer the LSP to discuss all such issues with its affiliate, Southwestern Bell Yellow Pages (SBYP), which is not subject to regulation by the Commission. Moreover, the sale of Yellow Pages advertising is not a negotiated telecommunications service that SWBT is obligated to provide under the Act.

This is not the first time an LSP has attempted to inject new issues in a post-arbitration setting. MCI and AT&T also attempted to submit issues which were not arbitrated and with which SWBT did not agree to the Texas Commission. The Texas Commission rejected the request to include such language and stated:

[t]he arbitration process was capable of resolving only those disputes brought before the Arbitrators. Where a disputed provision is presented for the first time in the Proposed Agreement -- and has not been the subject of arbitration proceedings -- the Commission is not in a position to determine whether the provision complies with FTA96 §252 standard.

The Missouri PSC should also reject the non-arbitrated, non-agreed to issues presented in MCI's proposed Interconnection Agreement. In the alternative, and without waiving its position that the Commission lacks the authority to resolve these issues, if the Commission determines otherwise, it should direct SWBT to file its proposed contract provision on these new issues and schedule an appropriate evidentiary hearing.

III. ISSUES SUBMITTED BY MCI THAT WERE ARBITRATED BUT AS TO WHICH LANGUAGE COULD NOT BE AGREED TO BY SWBT AND MCI

MCI is also seeking approval of provisions that were arbitrated but upon which implementing language could not be negotiated. While SWBT believes that the PSC could not decide non-arbitrated/non-agreed to issues, SWBT believes the PSC should address the arbitrated issues upon which the parties could not negotiate implementing terms. SWBT will present some of the basic issue list here and, like MCI, will separately file its proposed language and the reasons supporting SWBT's language in a matrix format.⁴

Under Part A, Section 6, SWBT has proposed language under 6.3.1 which states that:

"[T]he Parties represent that they have obtained or will obtain all necessary certifications and other regulatory approvals required by any applicable Federal, State, or Local law for the

⁴SWBT does not waive any legal arguments that the Arbitration Award in this docket is, in whole or in part, unlawful and SWBT does not waive its rights under state or federal law to seek further redress of such unlawfulness. SWBT also does not waive its right to seek redress in court on any provision of the Agreement.

provision or receipt of services referenced by this Agreement before such services are provided or received." SWBT's language is consistent with Senate Bill 507 and this Commission's certification orders and should therefore be adopted.

Under Attachment 1, Table 1, SWBT has proposed common transport rates broken down by zone. These rates are necessary due to SWBT's current inability to bill the transport mileage rates contained in its Interstate Access Tariff. The zoned rates were derived from the intrastate rates using average lengths of haul per zone. SWBT also proposed, for 9-1-1 charges, that "SWBT will charge MCI^m based on rates, terms and conditions of the Missouri General Exchange Tariff (MoPSC No. 35, Section 28) Universal Emergency Number Service (9-1-1)." This language is consistent with the PSC's Order as it reflects rates used in existing and intercompany compensation agreements and should be adopted.

SWBT also notes that the Commission should resolve, in conjunction with approval of an interconnection agreement, the issue of whether MCI may ignore the tariff use limitations which apply to SWBT and its customers.⁵ Under Attachment II, paragraph 2.15, SWBT has inserted language which states: "Other than statutory limitations, no other tariff use restriction shall apply until, upon explicit request from SWBT, such restriction is authorized by the Commission. MCI shall only sell Plexar services to a single end user. Except where explicitly provided in the corresponding tariffs, MCI^m shall not permit the sharing of a service by multiple end users or

⁵Southwestern Bell Telephone Company's Request for Imposition of Use Limitations and Conditions of Tariffed Services filed in this docket on February 11, 1997 and Southwestern Bell Telephone Company's Reply to Responses of MCI and AT&T to SWBT's Request for Imposition of Use Limitations and Conditions of Tariffed Services filed in this docket on March 13, 1997.

the aggregation of traffic from multiple end users onto a single service or except where SWBT permits such sharing by its own end users." Such language is consistent with the PSC's Arbitration Order and the rationale for requiring MCI not to ignore SWBT's tariff descriptions and limitations which SWBT has in its tariffs to define the services which it offers to its own end users.

Under Attachment II, paragraph 5.1.3-1, SWBT has inserted language which states that SWBT will exclude MCI's customers from customer lists so MCI can sell lists of its own customer names. This is consistent with the Arbitration Award, on issue 13, concerning white pages information being sold to third parties. Under Attachment II, paragraph 5.2.3, SWBT inserted language which provides that, where SWBT provides Operator Services to MCI's subscribers on behalf of MCI, SWBT will provide the MCI brand at nondiscriminatory prices. SWBT's language is consistent with the Commission's Arbitration Order on issue 20. SWBT also states in Attachment II, paragraph 5.2.8-1, that, consistent with the PSC's Order, MCI shall pay SWBT at the discount listed in Appendix A for all operator services' calls attributable to MCI's subscribers.

Under Attachment III, Network Elements, paragraph 1-1, SWBT has proposed provisions, consistent with the PSC's Order on Issue 8, which state that SWBT will provide Unbundled Network Elements in accordance with this Agreement, the Act, FCC Order, Rules and Regulations, and Commission Order and Rules. SWBT agrees not to impose unnecessary restrictions, and further proposes that there will be no restrictions or limitations on the use of UNEs that could be utilized by SWBT as a barrier to competition. Under paragraph 3.0 in Attachment III, SWBT has inserted language that would require the Network Elements provided

by SWBT to MCI to meet applicable regulatory performance standards at least equal in quality and performance as that which SWBT provides to itself. SWBT also seeks to require MCI to connect equipment and facilities that are compatible with SWBT Network Elements and to use such elements in accordance with regulatory standards. This wording is consistent with the Commission's Order on issue 10, in order to allow interconnection without damaging the network. In paragraph 4.3 under Attachment III, SWBT has proposed language which states that SWBT shall provide MCI, upon reasonable notice and to the extent technically feasible, unbundled loops and subloop elements to the extent that facilities and equipment for such unbundled loops and subloop elements are available. This language is consistent with the PSC's Order under Issue 5.

Under Attachment III, concerning customized routing, SWBT has inserted the time period within which it will be able to analyze the initial requests for custom routing and subsequent requests. Under Attachment III, paragraph 4, SWBT offered alternate language to that proposed by MCI concerning dark fiber. SWBT's language is consistent with the Commission's Order on issue 6 and is directly conformed to the PSC's language.

There are issues under Attachment IV concerning the transmission and routing of telephone exchange service and the rates to be charged where SWBT has submitted alternative language which SWBT believes is consistent with the Arbitration Order. For example, SWBT has inserted language in paragraph 6.2.5.1 which states that "Each party represents that it shall not send local traffic to the other party that is destined for the network of a third party unless and until such Party has the authority to exchange traffic with the third party." SWBT directly cites the language under Issue 31 of the PSC's Arbitration Order. Another example is in paragraph

4.8 where, although MCI agreed to proposed language concerning NXX migration, it omitted the provision requiring payment for use of the service. There are numerous other issues under this Attachment where SWBT has proposed alternate language which is consistent with the PSC's Order.⁶

There are numerous sections under Attachment VI, the Attachment concerning poles, conduits and rights-of-way where SWBT has submitted alternate language. Those sections are 3.06, 3.08, 5.04, 6.08(c), 6.11(a), 10.02(a)(b) and (c), 10.05, 10.09, 12.03(d), 19.01, 19.02, 19.04, 19.07, 19.08, 20.02, Appendix 1(A)(1)(a), B(1)(a), (C) and (D). SWBT will submit its language and rationale in a matrix to be filed later.

Under Attachment VII, Section 2.5.10-1, SWBT inserted language which states that the parties will comply with all effective FCC, Commission and/or court orders governing Interim Number Portability (INP) cost recovery and compensation. SWBT believes that, since INP is under review currently, until a final decision is rendered, the parties should agree to track the costs associated with the implementation and provision of INP (except for Route Indexing) and to "true-up" INP-related accruals to reflect such final Order. This language is consistent with the PSC's Arbitration Order, Order Issue 12.

IV. ISSUES AGREED UPON, BUT NEVER ARBITRATED

During intensive negotiations, SWBT has willingly negotiated numerous issues which were never arbitrated in a good faith effort to reach an interconnection agreement with MCI. As

⁶After the Commission rules upon SWBT's Motion to Strike, SWBT will compile a matrix that contains its alternate language on all areas that are arbitrated, but not agreed upon through negotiations.

stated by MCI, literally thousands of employee hours have been spent by SWBT meeting to discuss the Missouri Interconnection Agreement. These meetings included various groups and sub-groups. MCI has sought to negotiate hundreds of items which were not arbitrated. Therefore, a majority of the negotiation time was spent on issues which were not arbitrated.

MCI and SWBT had reached virtually no agreements at the time of the Arbitration because MCI refused to sign the same standard nondisclosure agreement that all other LSPs agreed to sign. As is obvious from the proposed interconnection agreement submitted by MCI, in which all language in regular text has been agreed upon between the parties, numerous provisions have been negotiated to a successful completion even though never arbitrated. Since MCI had not been able to negotiate any substantive issues prior to the Arbitration, the amount of regular text in the proposed agreement demonstrates the substantial number of issues resolved through negotiation.

Under Part A, paragraph 21, SWBT and MCI reached agreement on confidentiality and publicity and the handling of customer proprietary network information (CPNI). Agreement was reached under Section 25 on responsibility for payment of taxes. Part B contains agreed upon definitions of terms. Under Attachment II, paragraph 4, MCI and SWBT agreed to the responsibilities concerning change-over of subscribers to MCI's services. Numerous signaling issues were negotiated successfully under Attachment III, paragraph 11. Several issues concerning the Line Information Database (LIDB) under Attachment III, paragraph 13 were agreed upon though not arbitrated.

V. CONCLUSION

Though SWBT willingly negotiated the issues discussed and numerous other issues which were never arbitrated to a successful conclusion, the Commission cannot determine the status of other issues which were never arbitrated and upon which no agreement was reached. The Telecommunications Act of 1996 does not give the Commission the jurisdiction to decide unarbitrated issues, and there is no record upon which such a decision can be made. The Commission should strike all the bolded sentences in MCI's proposed Interconnection Agreement which do not reference alternate proposed language by SWBT as being nonarbitrated and nonagreed upon. The Commission should review and accept SWBT's proposed language on issues which were arbitrated but upon which language could not be agreed as discussed under Section II.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties on the Service List by first-class postage prepaid, U.S. Mail on June 26, 1996.

Diana Harter LB
Diana J. Harter

BEFORE THE PUBLIC SERVICE COMMISSION
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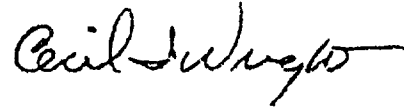
NOTICE REGARDING SCHEDULE FOR DEVELOPMENT OF PERMANENT RATES

On January 22, 1997, the Commission issued its Order Granting Clarification and Modification and Denying Motion to Identify and Motions for Rehearing. Within that order, the Commission established a "Schedule for Development of Permanent Rates" which was to be used for the final review of rates in this case. That schedule assumed the announcement of proposed permanent rates on May 30 and the issuance of a Commission order setting permanent rates on June 30, 1997.

The work of the Commission's arbitration advisory staff is still in process and the Commission has not been able to meet the May 30 date for announcement of proposed rates. The Commission will review the proposed permanent rates and will announce those proposed rates at the earliest opportunity. Upon announcement of the proposed permanent rates, the parties will still have 30 days in which to respond to those proposed permanent rates as provided for in the Commission's previously established schedule. An order announcing the proposed permanent rates and

establishing a comment period prior to the date on which the permanent rates will be adopted will be forthcoming.

BY THE COMMISSION

A handwritten signature in cursive script, appearing to read "Cecil I. Wright".

Cecil I. Wright
Executive Secretary

(S E A L)

Dated at Jefferson City, Missouri,
on this 9th day of June, 1997.

ALJ: Roberts